

**2010 Yukon Judicial Compensation Commission**

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**SUBMISSION OF THE GOVERNMENT OF YUKON  
IN RELATION TO THE SENIOR PRESIDING JUSTICE OF THE PEACE**

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## **SECTION I: INTRODUCTION**

### **The PEI Reference Case**

1. The decision of the Supreme Court of Canada in *Re Provincial Court Judges*, [1997] 3 S.C.R. 3 (the “PEI Reference Case”), recognized financial security as one of the three core characteristics of judicial independence, the other two being security of tenure and institutional independence. (See full text of the case at Tab 1 of Supporting Materials). Lamer C.J.C. for the majority of the Court explained the concept of financial security this way at paragraph 133:

First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation.

2. And at paragraph 147:

The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration.

3. In addition to the requirement that a commission be interposed between the judiciary and the executive of the Government to make recommendations on judicial remuneration, the Court also indicated that financial security requires that judicial remuneration be adequate and that it not fall below a basic minimum level. The reason for this, as noted by the Court at paragraph 135, is as follows:

Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.

4. However, the Court also emphasized that the guarantee of a minimum acceptable level of judicial remuneration is not a means to shield the courts from the effects of deficit reduction. The Court observed:

Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times (paragraph 196).

5. Moreover, the Court noted that salary increases can also be powerful economic levers and cautioned as follows:

...salary increases also have the potential to undermine judicial independence. (paragraph 159)

6. What is required, the Court held, is that an independent commission make recommendations on judicial remuneration that are grounded in objective criteria, not political expediencies, supported by reasons which relate to the public interest, broadly understood.

### **Part 3 of the Territorial Court Act – Mandate of the Commission**

7. As a result of the *PEI Reference* case, Part 3 (sections 13 to 29) of the *Territorial Court Act* (the “TCA”, set out at Tab 2 of Supporting Materials), which provides for the establishment every third year of a Judicial Compensation Commission (the “Commission”) was enacted. The Government and the judiciary both have input into the selection of the members in the manner set out in section 21. The Commission is mandated to make recommendations respecting all matters of “judicial remuneration” (section 14) which is defined as all forms of compensation including salaries, pensions, allowances and benefits.

8. In developing its recommendations, the Commission is directed by section 19 of the Act to consider any matter it considers relevant and in addition submissions made to it regarding the following:

- (a) the current financial position of the government;
- (b) the need to provide reasonable compensation to the judges;
- (c) the need to build a strong court by attracting qualified applicants;

- (d) the unique nature of the Yukon;
- (e) the compensation provided to judges in the Northwest Territories and British Columbia, Alberta and Saskatchewan;
- (f) the laws of the Yukon;
- (g) the cost of living in the Yukon, including the growth and decline in real per capita income; and
- (h) any submission by the public filed under section 26.

9. The recommendations made by the Commission are binding on Government to the extent that they do not exceed the highest total value of judicial remuneration provided to the provincial or territorial judges of British Columbia, Alberta, Saskatchewan or the Northwest Territories.

10. The Commission is thus established, as required by the *PEI Reference* case, as an independent body to make binding recommendations on judicial remuneration that are justified on an objective basis.

11. While the *PEI Reference* case was in relation to Judges, and the above-cited provisions from the legislation are as well, this Commission is given jurisdiction to review and set the judicial remuneration for salaried Justices of the Peace pursuant to Part 6 of the TCA, and specifically section 58 of the Act, which reads as follows:

#### Remuneration

58 Subject to section 59, judicial remuneration for salaried justices shall be set by the commission in accordance with Part 3 of this Act modified to suit the case. [see Tab 2 of Supporting Materials]

12. The reference to Part 3 of the Act is a reference to sections 13 to 29, which are the same provisions applicable to this Commission's constitution and powers vis-à-vis Territorial Court Judges.

13. Further, the constitutional principles referred to above that apply to the necessity of an independent commission to set judicial salaries apply equally to the issue of remuneration of Justices of the Peace.

**MODIFIED PROCESS**

14. Following the conclusion of the 2004 Judicial Compensation Commission (“JCC”), and in part in response to the recommendations of that Commission, the parties met and negotiated a Letter of Understanding to simplify and economize the JCC process [Tab 3 of Supporting Materials]. This hearing is being conducted pursuant to that Letter of Understanding. The constitutionality of this modified process was recently upheld by Schuler J. of the Yukon Supreme Court in *Cameron v. Yukon* (2011).

15. In particular, Articles 7.7 and 7.8 of the Letter of Understanding contemplate an informal meeting with the Commission to ascertain whether a Joint Submission can be made by both parties. Senior Presiding Justice of the Peace (“SPJP”) Cameron advised the Government that he was not interested in the informal procedure, but that instead, pursuant to Article 7.9, a formal hearing would be required. The relevant sections of the Letter of Understanding provide as follows:

7.7 By August 31, the representatives will meet with a view to identifying common ground and exploring the possibility of joint submissions on agreed upon issues.

7.8 During September, the JCC will convene to informally address any outstanding issues among the parties.

7.9 If agreement on outstanding issues cannot be reached informally, then a formal hearing will be conducted as and when directed by the JCC.

16. These submissions are being made as part of the formal hearing process.

## **SECTION II: OVERVIEW OF YUKON GOVERNMENT'S PROPOSED SOLUTION TO THE OUTSTANDING ISSUES**

### **SALARY**

17. The Yukon SPJP currently earns a base salary of \$116,169, which became effective April 1, 2009. The 2007 JCC recommended that the SPJP's salary increase 5.606%, effective April 1, 2007, with a 3% increase for the next two years thereafter. The Yukon Government rejected the Commission's recommendation for the increase in Year 1, and substituted 3% for that year. However, the Government later rescinded that substitution, and accepted the Year 1 increase as recommended by the JCC. As such, the Yukon Government has now fully implemented all of the 2007 JCC's recommendations respecting SPJP Cameron. In the result, the SPJP's salary since the 2007 JCC has (ultimately) been as follows:

April 1, 2007: 5.606% increase:	\$109,500
April 1, 2008: 3.0% increase:	\$112,785
April 1, 2009: 3.0% increase:	\$116,169

18. The Government acknowledges the valuable role played by the SPJP, and that the unique northern challenges faced by the judiciary should be recognized appropriately through remuneration.

19. However, for reasons that will be developed in more detail below, it is not appropriate that the salary of a SPJP be defined as a set percentage of a Territorial Court Judge's salary. Further, the salary of the SPJP is currently well above the JPs' salaries in each of the comparator jurisdictions.

20. It should also be noted that over the past several years, the remuneration of the SPJP has seen a substantial increase. Between 2000 and 2010, there has been close to a 74% increase in the SPJP's income,<sup>1</sup> whereas inflation in Whitehorse has only been 15.4% over the same period. Thus, the SPJP has enjoyed a 58% increase in his real income over this period. Both the rate of

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<sup>1</sup> From \$66,779 in 2000 to \$116,169 in 2010

increases and the absolute value of the salary are well above that enjoyed by most other sectors of Yukon's workforce.

21. In light of the above factors, the Government proposes a salary increase of 6% over three years (2.0% per year).<sup>2</sup> This increase, together with the robust pension and significant other health and employment benefits enjoyed by the SPJP, will ensure that the level of compensation remains well above the level required to maintain judicial independence.

### PENSION

22. As will be discussed below, the Government does not propose any changes to the pension benefit of the SPJP. In particular, the issue of the start date for the pension has already been considered by three previous JCC's, and not found to warrant change. There are no circumstances before this Commission that are any different than were before the previous Commissions, and the Government will submit that once a salary or benefit has been set by a JCC, another JCC should not sit in review of that determination.

23. In the following paragraphs, the Government will first review the history of the Yukon Commissions. We will then address each of the factors set out in the TCA to be considered in determining judicial remuneration, and how they relate to the Government's salary proposal. Finally, we will respond to the SPJP's proposals for remuneration.

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<sup>2</sup> With compounding, the 2012 salary will be 6.12% greater than the 2010 salary.

### **SECTION III: HISTORY OF YUKON COMMISSIONS**

#### **1998 Commission**

24. In December of 1998, following the *PEI Reference* case, the first Yukon Judicial Compensation Committee was established by Order in Council. The SPJP and the hourly rated Justices of the Peace were not included in the process at that time. For completeness, the Commission's report is included at Tab 4 of the Supporting Materials.

#### **2001 Commission**

25. In the autumn of 2001, the second Commission was established pursuant to the provisions of Part 3 of the *Territorial Court Act*. The SPJP was included in this process for the first time, and the duties and role of this position were extensively reviewed. Highlights of the binding recommendations made by the Commission are set out in Appendix A. The complete report is found at Tab 5 of the Supporting Materials.

#### **2004 Commission**

26. In the spring of 2004, the third Commission was established pursuant to the Act, and its recommendations again included the SPJP and hourly rated Justices of the Peace. The Commission's final report was issued in February of 2005, and can be found at Tab 6 of the Supporting Materials. Highlights of the recommendations of this Commission are also included in Appendix A herein.

#### **2007 Commission**

27. In 2007, the fourth Commission was established pursuant to the Act, and its recommendations again included the SPJP and hourly rated Justices of the Peace. The Commission's final report was issued in March 2008, and can be found at Tab 7 of the Supporting Materials. Highlights of the recommendations of this Commission are also included in Appendix A herein.

## **SECTION IV: APPLYING THE FACTORS SET OUT IN THE ACT**

28. The Government will review each of the factors which the Commission is required to address in its report pursuant to s. 19, modified to suit the SPJP's particular circumstances as directed by s. 58 of the Act.

### ***1) The Current Financial Position of the Government***

#### **Projected Surplus**

29. The Yukon Government's Main Estimates projects a surplus of \$38.4 million for 2011/2012.

#### **Net Financial Resources**

30. The Government's net financial resources from the same estimates are \$43.1 million for 2011/2012.

#### **Territorial Formula Financing Agreement**

31. The Government is highly dependent on transfer payments from Canada. The grant that comes through the TFFA alone makes up a significant proportion of the Government revenues. Other major federal transfer payments (e.g. Canada Health Transfer), when combined with the TFFA grant, make up the vast majority of the Government's total revenues. The remaining source of revenues are made up of "own source revenues", including taxes and fees.

32. Even if "own source revenues" were to increase in volume because of improved economic activity, the TFFA mechanism results in an offset or claw back against the grant received such that the net financial position of the Government would not be improved and in fact could worsen. Increasing tax rates is an option available to the Government to increase revenue flows and to improve the Government's fiscal position; however, the *Taxpayer Protection Act* dictates that the Government first seek the public's consensus through a plebiscite for a tax increase other than a tobacco tax increase. This is a complex endeavour that could take some time to accomplish and is not a politically appealing undertaking.

33. Even if rates were to be increased on some taxes, owing to the limited tax bases in the Yukon, minimal additional revenues can be raised.

34. This dependency on federal transfer payments, accompanied by the volatility and unpredictability of the complex TFFA grant elements, makes the accurate predictions of the Government's fiscal position challenging. For example, a decline in the provincial/local expenditure escalator used in the TFFA to calculate the grant could result in a several million dollar loss in the transfer payment. Similarly, if our population growth lags behind the national average growth, this results in losses in the TFFA grant.

35. Given this volatility, maintaining sufficient reserves to deal with potential grant downswings is prudent fiscal management.

#### **Cost of Implementing Commission Recommendations**

36. In making recommendations on judicial remuneration, the cost of the recommendations to the public purse needs to be considered. In calculating actual costs, it must be remembered that salary increases have an impact on pension, group insurance and leave benefit costs. This "domino effect" means that a straight salary increase to the Judiciary will actually cost the Government a multiple of that figure in pension and other benefit costs.

37. While the straight salary increases are simple enough to compute, and may at first glance appear modest, it cannot be forgotten that there is a multiplier effect in terms of the costs to the Government when the increased pension costs are factored in, as the SPJP enjoys enrolment in the same defined benefit pension plan available to the Judiciary, one which allows a 70% pension after approximately 23 years of service. The Yukon Government has had these increased costs actuarially calculated on its proposal of three successive 2% annual increases. In its report dated June 15, 2011 [Tab 8 of Supporting Materials], AON has costed the Government's proposal as follows:

	2010/11	2011/12	2012/13	Total
Total cost of justice of the peace salary and benefits	\$118,492	\$120,862	\$123,279	\$362,633.00
Total cost of benefits, with salary increase	\$11,849	\$12,086	\$12,328	\$36,263.00
Total cost of justice of the peace pension	\$46,094	\$47,015	\$47,955	\$141,064.00
Total personnel costs with increases	\$176,435.00	\$179,963.00	\$183,562.00	\$539,960.00

## 2) *The Need to Provide Reasonable Compensation to the SPJP*

38. Financial security as a component of judicial independence requires that judicial salaries be above an adequate minimal level required for the office of a judge. At the same time, large salary increases that cannot be justified on an objective basis are also to be avoided. Thus, there is a range of compensation, the top and bottom margins of which identify the points that “public confidence in the independence of the judiciary would be undermined” (*PEI Reference case*, paragraph 135).

### Relative Financial Position of the SPJP

39. To determine what is reasonable compensation, appropriate to the judicial office and sufficient to ensure financial security, it is helpful to survey the income in various sectors in the Yukon to gain an understanding of the relative financial position of the SPJP to others in the community he serves. The SPJP currently earns \$116,169. The *per capita* personal income in the Yukon over the last few years has been as follows:

2003: \$30,613

2004: \$32,194

2005: \$34,548

2006: \$36,120

2007: \$46,854

2008: \$47,922

2009: \$48,407

40. The income levels for other sectors are as follows:

- a deputy minister with the Yukon Government earns between \$155,003 and \$207,362<sup>3</sup>
- a senior lawyer with the Yukon Government earns between \$100,578 and \$134,537<sup>4</sup>
- teachers with 10 or more years of experience earn between \$90,037 and \$97,845<sup>5</sup>
- the Premier of Yukon earns \$136,387<sup>6</sup>

41. Over the (approximately) eight year period from the first increase for the SPJP effective September 2001 to the last salary increase on April 1, 2009 as a result of the recommendations of the 2007 Commission, there has been a 73.9% increase in the salary of the SPJP.<sup>7</sup> The percentage increase in the CPI over the same period was 15.4%.<sup>8</sup> Hence, over this 8 year period, the increase in the SPJP's real income was over 58%.

42. In contrast, over the period from 2001 to 2006, for example, Yukon Government employees received the following increases, before inflation:

- 2001: 2.25%
- 2002: 3.00%
- 2003: 2.00%
- 2004: 2.50%
- 2005: 2.50%
- 2006: 3.00%
- 2007: 3.00%
- 2008: 3.00%
- 2009: 3.00%
- 2010: 2.00%

43. Managers and legal officers employed by the Government received the following wage increases:

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<sup>3</sup> Information provided by the Employee Compensation Branch of the Yukon Government's Public Service Commission.

<sup>4</sup> Ibid.

<sup>5</sup> Teacher Pay Grid.

<sup>6</sup> As set out in the *Legislative Assembly Act*.

<sup>7</sup> Increase from \$66,779 to \$116,169.

<sup>8</sup> CPI for 2001 was 99.3 and the CPI for 2010 was 114.7 [information published by Statistics Canada, Tab 14].

- 2007: 3.00%
- 2008: 5.00%
- 2009: 3.00% (MG), 4% (LE), 7% (DM)
- 2010: 2.00%

44. It is apparent, then, that the salary of the SPJP is currently considerably higher than the salaries of most other sectors of the workforce in the Yukon. This salary has over the last number of years grown at a significant rate. It should also be noted that the SPJP receives a Yukon Bonus travel benefit of \$2,242 per year. Moreover, the judicial pension plan of which the SPJP is a member is a robust one that is considered more beneficial than the plan applicable to territorial and federal employees, for example,<sup>9</sup> and is an important aspect of compensation which also contributes to the financial security of the judiciary.

### 3) *The Need to Build a Strong Court by Attracting Qualified Applicants*

45. The Yukon Government wants a strong court as does the public. There are several factors that attract individuals to the judiciary including a professional desire to discharge the important and challenging role a member of the judiciary plays in our society. The ability to make a difference and have a meaningful impact on society through one's work, especially in a small jurisdiction like the Yukon, is certainly one of the non-monetary rewards. JPs, like elected officials, assume these positions in the government structure to serve the public and accept the fact that public service may have some drawbacks.

46. Compensation is also one of the factors in attracting qualified candidates to the bench and keeping them. The compensation must be seen to be reasonable given the responsibilities and challenges of the position.

47. To begin with the issue of retention, it is to be noted that there has been no turnover in the SPJP's position. As discussed in more detail below, the SPJP position was commenced as a trial project in July 1994. SPJP Cameron was the successful incumbent in that position, and remains

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<sup>9</sup> For example, the accrual rate for the judicial pension plan is 3%, while under the public service superannuation plan it is 2%; the pension benefit for the judiciary is based on best average earnings over 2 years while under the PSSP the benefit is based on best average earnings over 5 years.

to date. Clearly, then, there can be no suggestion that the salary of the position is presenting any retention issues.

48. In terms of recruitment, it bears noting that the SPJP is not required to be a lawyer, nor is he a lawyer. The Government will assume, however, that the likely pool of candidates for the SPJP's successor will be lawyers, and examine the recruitment issue in this light.

49. There are approximately 130 resident members of the Yukon Law Society. Of the 130 resident members, more than half are members of the bar of at least 10 years standing, the threshold required for appointment to the bench.

50. The table found at Tab 20 of the Supporting Materials (drawn from the 2006 Census figures) reveals that the average employment income in 2005 for lawyers across Canada was \$142,345.

51. It is acknowledged that these numbers represent average incomes, and are now dated. One would generally expect that lawyers with 10 or more years of experience would be earning more than the average income. Nevertheless, the numbers are reflective of the relative incomes of lawyers across the country.

52. Although not a lawyer, the SPJP earns \$116,169, the highest salary paid to a presiding JP in the comparator jurisdictions.

53. Moreover, the SPJP has a valuable pension plan as noted above that must be considered in terms of the ability to attract qualified candidates. In *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice)*, [2003] N.B.J. No. 321 (N.B.C.A.) [Tab 9 of Supporting Materials],<sup>10</sup> the New Brunswick Court of Appeal stated as follows:

It is universally accepted that the value of the judicial pension is a significant factor to be taken into account in comparing the income position of judges and lawyers in private practice....This is because lawyers in private practice do not

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<sup>10</sup> This decision was upheld by the Supreme Court of Canada in 2005: see Judgment at Tab 10.

have the benefit of pension arrangements or pension schemes and are obliged to save for their retirement. [at paragraph 168]

54. Given the foregoing, it is submitted that there is little or no risk that qualified candidates would be deterred from applying for the position of SPJP on the basis that the compensation proposed by the Government is not adequate.

**4) *The Unique Nature of the Yukon***

55. The Yukon is a wonderful place to live and raise a family. Wilderness activities including hiking, paddling and camping are easily accessible and Yukoners live in a rugged and beautiful landscape. Interesting sporting events are a part of life as well including the Chilkat Bike Relay from Haines Junction to Haines, the Skagway to Whitehorse Road Relay, various triathlon events and the Yukon River Quest to name a few.

56. Whitehorse also boasts a vibrant arts scene which includes local, national and international musical and theatrical presentations at the Yukon Arts Centre and the Guild Hall; music, storytelling and writers' festivals; and several art galleries. The Yukon also enjoys a varied demographic, enriched by First Nations' culture, and has been in the forefront of some major social changes, including the settlement of modern day treaties and the implementation of self government arrangements for First Nations. All of this makes the Yukon an exciting place to live.

57. At the same time, direct air connections to Vancouver, Edmonton and Calgary allow residents to easily travel south. Affluent residents make regular trips to destinations outside of the Yukon for holiday, shopping or to attend cultural events.

58. However, it is acknowledged that in a small community like Whitehorse, there is some social isolation for the judiciary.

59. Moreover, it is recognized that the substantial First Nations population in the Territory requires the SPJP to be familiar with and sensitive to aboriginal culture and practices.

60. The Government is aware of the contribution which the SPJP makes to life in the Yukon and the careful approach he has utilized to assist in the administration of justice. As a result, the remuneration proposal put forward by Government includes a salary that is substantially higher than that found in British Columbia, Alberta and Saskatchewan, and indeed is the highest salary received by SPJPs in the comparator jurisdictions in recognition of the particular challenges faced by the judiciary in the North.

5) ***The Compensation Provided to JP's in the Northwest Territories, British Columbia, Alberta and Saskatchewan / Cost of Living in the Yukon, Including the Growth or Decline in Real Per Capita Income***

61. To assist the Commission in comparing the salary and benefits of JPs in the comparator jurisdictions, the Government has included the most current reports of JP Compensation Commissions, as follows:

1. Report of the Judicial Justices of the Peace Compensation Commission (B.C.), dated September 28, 2010, recommending JP salaries for April 1, 2011 to March 31, 2014 [Tab 11 of Supporting Materials].
2. Response of BC Government to BC JP JCC Report, dated May 2011 [Tab 12 of Supporting Materials].
3. Report and recommendations of the 2006 Alberta Justices of the Peace Compensation Commission, dated January 15, 2007, recommending JPs salaries for April 1, 2003 to March 31, 2008 [Tab 13 of the Supporting Materials]. The JCC for Alberta JPs' salaries post-March 31, 2008 is currently underway, and by Regulation is to report no later than January 14, 2012.

62. There is no compensation commission for JPs in Saskatchewan. A supervising JP's salary after June 6, 2004 is prescribed in s. 14(1.1) of the *Justices of the Peace Regulations, 1989*, as follows:

- (1.1) A supervising justice of the peace is entitled to be paid a salary in an amount that is \$5,000 per year more than the annual salary paid to a traffic justice pursuant to section 3 of *The Traffic Safety Court of Saskatchewan Regulations*, for the period commencing on June 7, 2004.

63. The benchmark salary of a traffic justice can be found in *The Traffic Safety Court of Saskatchewan Regulations*, s. 3 of which reads as follows:

### **Salary**

3(1) For the purposes of clause 5(7)(a) of the Act, a traffic justice is entitled to be paid, for each month of service by the traffic justice, a salary of:

- (a) \$4,185 per month for the period ending on June 30, 1990;
- (b) \$4,352 per month for the period commencing on July 1, 1990 and ending on June 30, 1991;
- (c) \$4,526 per month for the period commencing on July 1, 1991 and ending on June 30, 1994;
- (d) \$4,617 per month commencing on July 1, 1994 and ending on June 30, 1997;
- (e) \$4,663 per month commencing on July 1, 1997 and ending on June 30, 1998;
- (f) \$4,804 for the period commencing on July 1, 1998 and ending on June 30, 1999;
- (g) \$4,900 for the period commencing on July 1, 1999 and ending on June 30, 2000;
- (h) \$4,998 for the period commencing on July 1, 2000 and ending on March 31, 2001;
- (i) \$5,583 for the period commencing on April 1, 2001 and ending on March 31, 2002;
- (j) \$5,923 for the period commencing on April 1, 2002 and ending on March 31, 2003;
- (k) \$6,272 for the period commencing on April 1, 2003 and ending on June 30, 2005;
- (l) \$6,335 for the period commencing on July 1, 2005 and ending on June 30, 2006;
- (m) \$6,513 for the period commencing on July 1, 2006 and ending on June 30, 2007;
- (n) \$6,916 for the period commencing on July 1, 2007;
- (o) \$7,193 for the period commencing on April 1, 2008 and ending on March 31, 2009;
- (p) \$7,517 for the period commencing on April 1, 2009 and ending on March 31, 2010;
- (q) \$7,630 for the period commencing on April 1, 2010 and ending on March 31, 2011;
- (r) \$7,783 for the period commencing on April 1, 2011.

64. This therefore makes a Supervising JP's annual salary in Saskatchewan effective April 1, 2010 as \$96,560.00

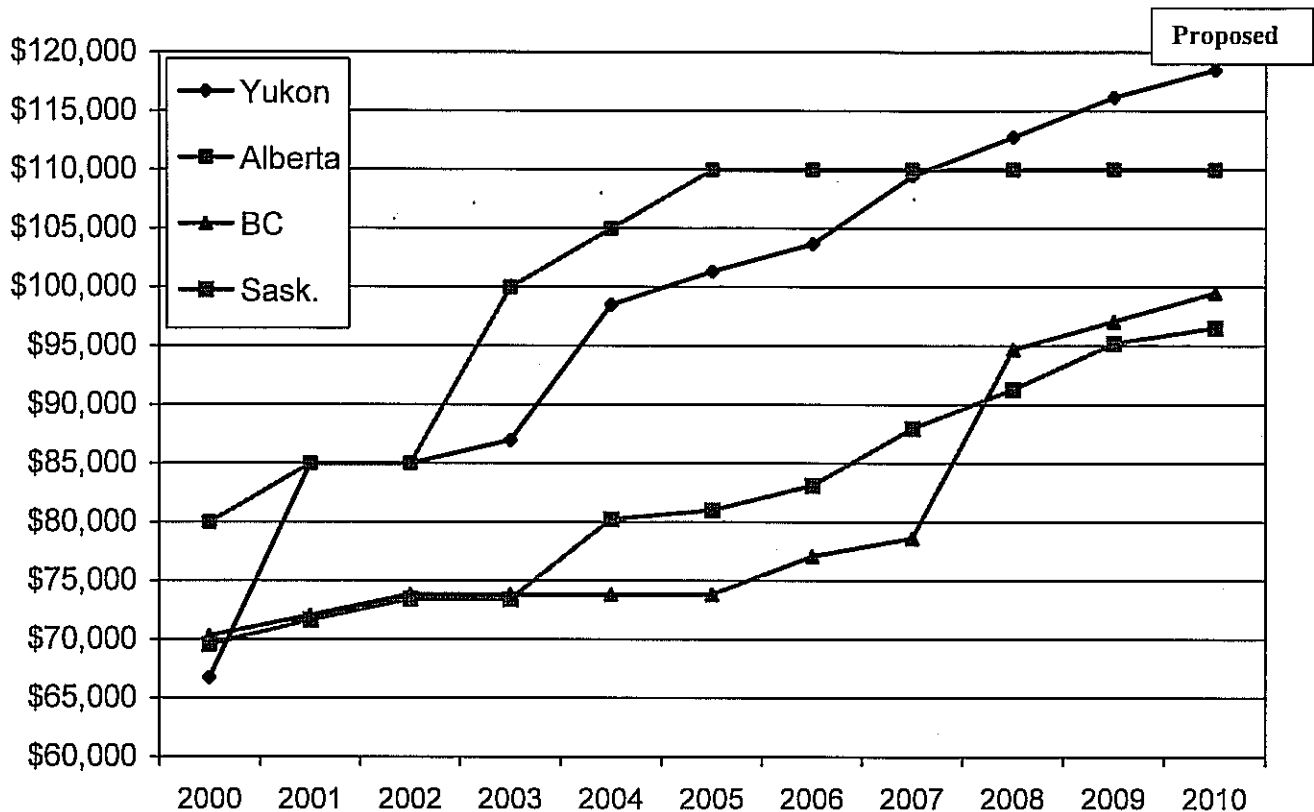
65. With respect to the NWT, there are no presiding JPs, so no comparisons are available there.

66. The salaries of JPs in the 3 comparator jurisdictions set out in the TCA, and that of the SPJP in the Yukon since 2000 are as follows:

**Salaries of JPs in Yukon and Comparator Jurisdictions**

	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>
Alberta	\$80,000	\$85,000	\$85,000	\$100,000	\$105,000	\$110,000	\$110,000	\$110,000	\$110,000	\$110,000	\$110,000
BC	\$70,312	\$72,070	\$73,872	\$73,872	\$73,872	\$73,872	\$77,112	\$78,654	\$94,730	\$97,100	\$99,525
Sask.	\$69,588	\$71,676	\$73,464	\$73,464	\$80,264	\$81,020	\$83,156	\$87,992	\$91,316	\$95,204	\$96,560
Yukon	\$66,779	\$85,000	\$85,000	\$87,000	\$98,500	\$101,356	\$103,687	\$109,500	\$112,785	\$116,169	TBD

67. The following chart demonstrates this information on a graphical basis:



68. It is also crucial to bear in mind, when comparing JP salaries across jurisdictions, that it is the total wage and benefit package that must be considered. As mentioned above and as determined by the courts, a pension plan is a significant aspect of judicial remuneration. A comparison of the various benefit packages offered to JPs in the comparator jurisdictions is found in the AON report dated June 15, 2011 [Tab 8 of Supporting Materials].

69. In Alberta, in addition to earning less than the SPJP in the Yukon, Alberta JPs are not members of any pension plan – even the public service pension plan – but instead are given an additional 10% of their salary to “self-fund” their own pension plan.

70. In BC, JPs are members of the public service pension plan alone which, per the AON report, amounts to an annual value of \$16,919 in 2010. In previous JP JCCs in BC, JPs have sought pension benefits akin to provincial court judges (like SPJP Cameron), and have seen these requests not recommended by the JCCs. In the 2004 JP JCC in BC, for example, the commission stated on this point as follows:

JJPs have asked to receive the same pension benefits that Judges are entitled to under section 21 of the Judicial Compensation Act. This section credits Judges with 1.5 years of service for each year actually served. The Commission believes this to be an extraordinary benefit that has been accorded to Judges for many years (and until relatively recently also to Deputy Ministers). The justification appears in part to be based on the fact that Judges accept appointments to the bench in mid-to-late career.

The Commission does not believe that such an extraordinary pension entitlement is necessary, either as a component of reasonable compensation or to attract qualified applicants for JJP positions. While, as the JJP Association emphasized in their submissions, the costs of providing this benefit to JJPs would be relatively minimal because of the small numbers involved, the Commission does not see this as being a compelling justification for doing so. [at p. 29]

71. In Saskatchewan, JPs are members only of the Public Employees Pension Plan, and not the plan applicable to Provincial Court Judges. AON places the annual value of this pension benefit at \$6,536 per annum, based on 5% contributions from the member and 7% from the Government

72. In looking at comparator jurisdictions, it is sometimes stated that SPJP Cameron's position is a "unique" one. The Government does accept that there is some uniqueness, given the small jurisdiction, and the fact that he is the only Senior Presiding Justice of the Peace in the jurisdiction.

73. However, the duties performed by SPJP Cameron, compared to other presiding JP's, are not particularly unique, certainly not enough to justify a substantial disparity in salary from his brethren.

74. The most recent JP JCC report that sets out the duties of "comparator" JPs is that of British Columbia's. In it<sup>11</sup>, the BC JP JCC set out the following duties of JPs (or "Judicial Justices of the Peace", as they are called in BC) in BC's Provincial Court system (equivalent to the Territorial Court system). The following passage from its report, while lengthy, is important:

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<sup>11</sup> Tab 11 of Supporting Materials

Justice Centre, Burnaby, BC

25. JJs are available 24 hours a day, 7 days a week, 365 days a year to deal with bail, search warrants and production orders. Much of this work is done through the Justice Centre, which is operational 16 hours per day. When the Justice Centre is not open, JJs are available on an on-call basis.

26. Judicial Justices deal with judicial interim releases at the Justice Centre by teleconference or by videoconference. In conducting these hearings they are frequently dealing with unrepresented litigants and inexperienced police officers. As in court, these hearings are conducted without the benefit of additional support staff. The responsibility of the JJs is considerable as the outcome of these hearings could result in the incarceration of an individual until the conclusion of their trial – regardless of whether the individual is ultimately found guilty of the offence charged. We are informed that since the last Commission in 2007, JJs have conducted 53,000 bail hearings.

27. Judicial Justices also hear the majority of the Province's search warrant and production order applications; these are dealt with by telephone, fax and face to face from every part of the province. The applications can be straightforward and dealt with within an hour or quite complex requiring a day or more to decide to grant or refuse the application. The JJs must be cognizant of the *Charter* and the *Criminal Code* when processing these applications; theirs is the role of the "gatekeeper" between an individual's privacy rights and state intervention, often in the face of urgent circumstances. There is an expectation of written reasons, albeit brief, when refusing these applications. Since 2007, 13,500 applications for search warrants and production orders have been processed by the JJs.

Provincial Court

28. As noted by Martin Taylor, Q.C., in the 2007 Commission Report:

When presiding in court JJP's are attired and conduct themselves as judges in the ordinary sense, and are seen as such by thousands of people who appear before them each year.

To such persons there is no more important judge than the one before whom they appear. Judicial Justices are expected to demonstrate the care and patience, courteous consideration and impartial judicial deportment that is required of judges.

29. When sitting in Provincial Court, the JJs primarily adjudicate traffic cases but also hear municipal bylaw cases, Small Claims payments hearings and a variety of other claims and charges under 77 other provincial statutes. We are advised by the JJA that standard sittings in these courts are 15 minutes per trial or hearing with up to 60 hearings a day.

30. In 2009, JJs adjudicated over 90,000 hearings. These hearings are conducted, for the most part, without any additional support, security or assistance. They are also conducted primarily with unrepresented litigants and sometimes with the aid of interpreters. There is an expectation and obligation on the JJs to take care to explain the process to litigants. JJs must apply the principles of natural justice, procedural fairness and the rules of evidence. They have the ability to impose fines for traffic and bylaw offences and their adjudication of traffic offences can potentially result in a change in insurance premiums or a suspension of licence. At the conclusion of the hearings, reasons will be given, typically orally.

31. Judicial Justices serve on the front line of the criminal justice process and daily perform judicial functions that can, and do, profoundly impact the rights, liberties and livelihoods of individuals. For many appearing in front of JJs, this will be their only interaction with a court, and as such the JJs are the face of the court and, for all intents and purposes, the only judge they will ever know. While there is a clear and meaningful distinction between the roles and functions of a JJ and a Provincial Court Judge, the role the former plays within the provincial judiciary is important to the fair, efficient and expeditious functioning of the Provincial Court.

75. SPJP Cameron's duties are not significantly different, nor more responsibility-laden than those of his counterparts in BC. He is perceived as the first contact with the judicial system for many, just as they are. What is more:

1. BC Judicial Justices are required to be lawyers, who have practiced for five years before being appointed. No such requirement exists in the Yukon, nor is SPJP Cameron a lawyer.
2. BC Judicial Justices earn \$99,525.00 per annum, effective April 1, 2010. The BC JP JCC recommended a 0% increase for the next two years, and an 8% increase for Year 3. The BC government has rejected Year 3's recommendation, and substituted a third 0%, so unless this rejection is disturbed by the courts, BC Judicial Justices will be at less than \$100,000.00 per annum for the next three years, a threshold SPJP Cameron crossed long ago in 2005.

### **Cost of Living**

76. Cost of living increases in Whitehorse over the last 25 years have been very modest. At Tab 14 of the Supporting Materials are the historical summaries maintained by Statistics Canada of provincial CPI rates. On average, the annual rate of inflation has been 1.82% over this period, and about 1.54% per annum over the last 10 years.

### Economic Growth Rates

77. The following Table demonstrates the real (i.e. inflation-adjusted) economic growth rates for the Yukon, as well as those in Canada as a whole:

	2004	2005	2006	2007	2008	2009	2010
<b>Yukon</b>	5.4%	2.5%	5.4%	5.6%	2.4%	3.6%	2.1%
Canada	3.1%	3.0%	2.8%	2.3%	0.6%	-2.6%	3.3%

### Tax Rates

78. Yukon residents enjoy relatively low personal income tax rates. The following chart taken from CCRA published information<sup>12</sup> provides a good comparison with other jurisdictions' provincial tax rates:

<b>Provincial / Territorial tax rates (combined chart)</b>	
<b>Provinces / Territories</b>	<b>Rate(s)</b>
Newfoundland and Labrador	7.7% on the first \$31,904 of taxable income, + 12.5% on the next \$31,903, + 13.3% on the amount over \$63,807
Prince Edward Island	9.8% on the first \$31,984 of taxable income, + 13.8% on the next \$31,985, + 16.7% on the amount over \$63,969
Nova Scotia	8.79% on the first \$29,590 of taxable income, + 14.95% on the next \$29,590, + 16.67% on the next \$33,820 + 17.5% on the next \$57,000 21% on the amount over \$150,000
New Brunswick	9.1% on the first \$37,150 of taxable income, + 12.1% on the next \$37,150, + 12.4% on the next \$46,496, + 14.3% on the amount over \$120,796
Ontario	5.05% on the first \$37,774 of taxable income, + 9.15% on the next \$37,776, + 11.16% on the amount over \$75,550
Manitoba	10.8% on the first \$31,000 of taxable income, + 12.75% on the next \$36,000, +

<sup>12</sup> See <http://www.cra-arc.gc.ca/tx/ndvdl/fq/txrts-eng.html#provincial>

	17.4% on the amount over \$67,000
Saskatchewan	11% on the first \$40,919 of taxable income, + 13% on the next \$75,992, + 15% on the amount over \$116,911
Alberta	10% of taxable income
British Columbia	5.06% on the first \$36,146 of taxable income, + 7.7% on the next \$36,147, + 10.5% on the next \$10,708, + 12.29% on the next \$17,786, + 14.7% on the amount over \$100,787
Yukon	7.04% on the first \$41,544 of taxable income, + 9.68% on the next \$41,544, + 11.44% on the next \$45,712, + 12.76% on the amount over \$128,800
Northwest Territories	5.9% on the first \$37,626 of taxable income, + 8.6% on the next \$37,627, + 12.2% on the next \$47,092, + 14.05% on the amount over \$122,345
Nunavut	4% on the first \$39,612 of taxable income, + 7% on the next \$39,612, + 9% on the next \$49,576, + 11.5% on the amount over \$128,800

[The high income surcharge applies to territorial tax in excess of \$6,000].

#### 6) *The Laws of the Yukon*

79. Paragraph 19(f) of the TCA requires the Commission to consider submissions made to it on the laws of the Yukon. There appear to be 2 possible interpretations of this paragraph. One interpretation is that the Commission is required to consider submissions made to it on the number, nature and complexity of the laws of the Yukon in setting judicial remuneration for the SPJP who must interpret and apply that law.

80. However, it is submitted that the interpretation given to a similar provision to consider “the laws of the [Northwest] Territories” in the *Territorial Court Act* of the NWT by the most recent NWT Judicial Remuneration Commission is the approach to be preferred. At page 2 of its report, the Commission stated as follows:

We view this as requiring the Commission to look generally at the law of the NWT and not at any one particular aspect of it. That is, we must be cognizant of the law in making our recommendations and be certain that none of our recommendations undermine or violate that law.

81. In the Yukon, this means that the JCC must, in making its recommendations, have regard to legislation like the *Taxpayer Protection Act*. Under that Act, the Yukon Government is prohibited from incurring an accumulated deficit without dissolving the Legislative Assembly and recommending that an election be held. The Act also stipulates that new taxes may not be imposed nor fuel taxes increased without first holding a public referendum. Accordingly, the Commission must ensure that none of its recommendations would cause the Government to incur an accumulated deficit as this would “undermine” or “violate” that Act.
82. The salary proposal by the Government would not lead to any contravention of this law.

## **SECTION V: DISCUSSION OF OUTSTANDING ISSUES**

### **1. THE GOVERNMENT'S SALARY PROPOSAL**

#### **A. The JP System in the Yukon**

83. Under the TCA, there are three categories of Justices of the Peace (other than the SPJP). These are JP3s, JP2s, and JP1s. Both JP3s and JP2s may be presiding as well as administrative justices. The JP1 category is for administrative duties only.

84. These three categories of JPs are paid on an hourly basis. The rates (which were increased as of April 1, 2004) are as follows:

JP1: \$30.00 per hour

JP2: \$35.00 per hour

JP3: \$55.00 per hour

85. These rates (though only for sitting on statutory holidays) are currently under review by the 2010 JCC.

#### **B. Background to the SPJP Position, and its Salary**

86. Up until 1994, JP3 services in Whitehorse were provided entirely on a part-time, fee for services basis. In 1994, the Territorial Court came forward with a proposal for the establishment of a full time, permanent Senior Justice of the Peace position to be filled by Mr. Cameron. The Department of Justice agreed to support the concept of the position for a two year trial period, following which the effectiveness of the position would be evaluated.

87. The then Deputy Minister of Justice, John Lawson, wrote to the then Chief Judge John Faulkner, setting out that the position would be established for two years, following which any renewal or extension of the arrangement would be based on a joint prior evaluation, and approval of the Court and the Department of Justice.

88. A misunderstanding subsequently arose between the Department and the Court as to the precise date of the end of the term. Mr. Lawson's memo indicated that the position would end on March 31, 1996, at the end of the second fiscal year. However, the July 4, 1994 letter of authorization to Mr. Cameron from the Chief Judge stated the term would end two years hence i.e. July 4, 1996. In the end, the latter date was accepted by all parties as the date of the expiration of the term.

89. Ministerial Order 1994/07<sup>13</sup> was passed, which established the annual stipend of the Senior Justice of the Peace at \$62,000 per annum. With respect to benefits, it was agreed that the Senior Justice of the Peace would receive all the same benefits as were established for members of the management group of the Yukon public service, except that the Senior Justice of the Peace would not receive the Yukon bonus and would not be enrolled in the superannuation plan, the group surgical/medical insurance plan or the group dental plan. This agreement was reflected in the Ministerial Order as well.

90. At around the time of the expiration of the initial 2 year term, an evaluation of the position of Senior Justice of the Peace was undertaken. While this was taking place, the term of the position was extended on an interim basis by letter of authorization from Chief Judge Faulkner to October 4, 1996, then to January 5, 1997, then to April 6, 1997, and then to April 30, 1997. It was then extended indefinitely by letter of authorization from the Chief Judge as of April 7, 1997.

91. Ministerial Order 1999/07<sup>14</sup> continued the annual stipend of the Salaried Presiding Justice of the Peace at \$62,000. However, the Order also specified that the Salaried Presiding Justice of the Peace would receive such general increases to that stipend as were awarded to the members of the public service management group from time to time. The Order continued to provide that the Salaried Presiding Justice of the Peace would not receive the Yukon bonus, and would not be enrolled in the public service superannuation plan, the extended health plan or the dental plan.

92. Through the annual incremental increases to the stipend, the Salaried Presiding Justice of the Peace was earning a salary of \$66,779 at the time of the 2001 Commission. By 2001, as

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<sup>13</sup> At Tab 15 of the Supporting Materials.

<sup>14</sup> At Tab 16 of the Supporting Materials.

noted above, the *Territorial Court Act* had been amended so that the remuneration of a salaried justice would be set by the Commission in accordance with Part 3 of that Act.

93. As set out in Appendix A, the 2001 Commission increased the salary of the SPJP to \$85,000 as of September 1, 2001 and to \$87,000 as of April 1, 2003 – an overall increase of 30% or a 28.5% increase in real income.

94. The Commission also recommended that the SPJP receive all the other benefits on the same basis as the Judges, with the exception of educational leave.

95. With respect to pension, the 2001 Commission recommended that the SPJP receive a pension on the same basis as the Judges, and that pensionable service be deemed to have commenced on April 1, 1996 (which coincided with the end of the “trial period” and the commencement of the position on a permanent basis).

96. To implement the pension recommendation of the 2001 Commission for the Judges and the SPJP, the Legislature enacted the *Territorial Court Judiciary Pension Plan Act, 2003*, which provides April 1, 1996 as the date that pensionable service is deemed to have commenced for the SPJP.

### **C. Increases Proposed by Government**

97. The Government proposes that the SPJP receive salary increases of 2% each year for the next 3 years, so that the existing salary of \$116,169 will be increased as follows:

Effective April 1, 2010: \$118,492

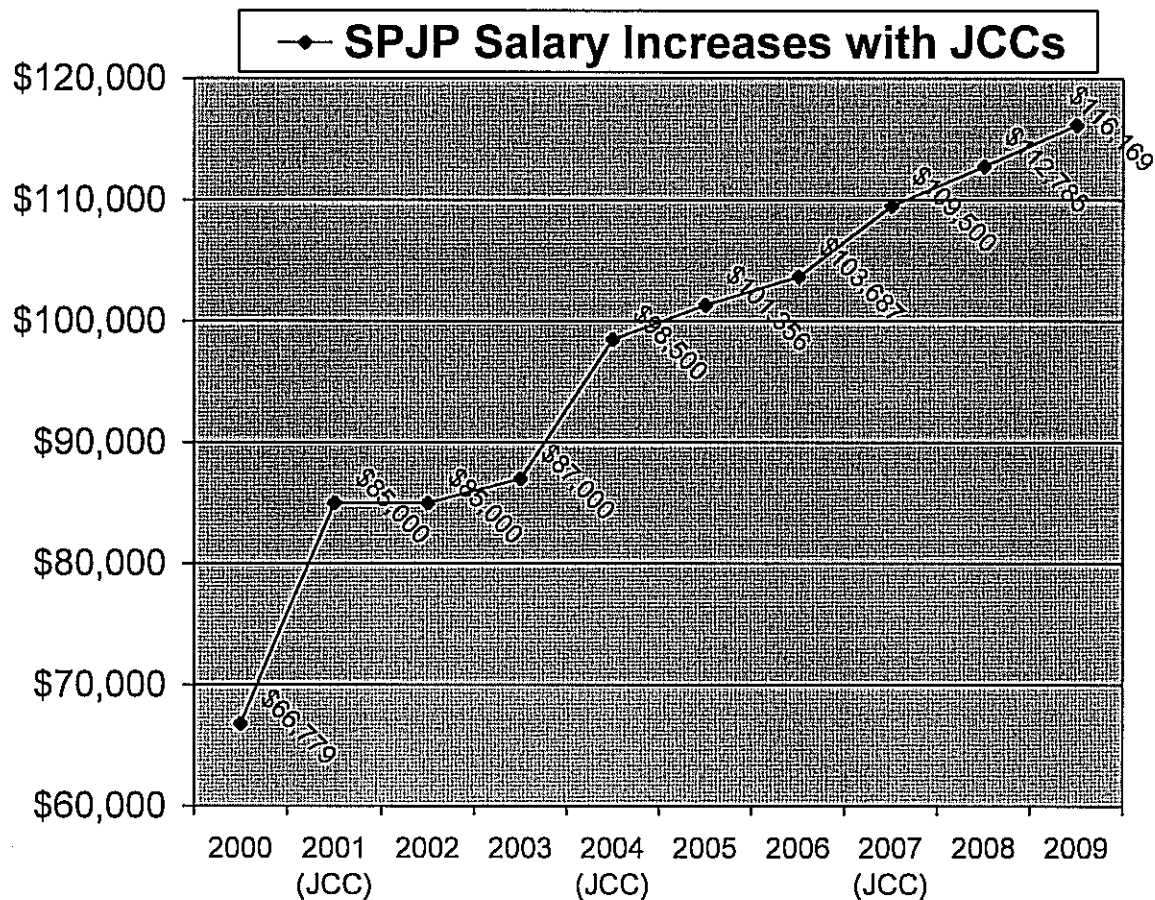
Effective April 1, 2011: \$120,862

Effective April 1, 2012: \$123,280

98. The Government submits that these are reasonable and appropriate increases, for the following reasons.

99. First, the Yukon economy has enjoyed improvement, and the judiciary should benefit from this as do the rest of the Yukon's citizens. But the Government must be mindful of its role as guardian of the public purse, as well as perceptions about salary levels of the judiciary.

100. On this latter point, it must be noted that the SPJP's position has enjoyed nearly unprecedented wage increases over the last 10 – 11 years. In 1999, the position paid \$62,000 per annum. Today, some 10 years later, the position has a salary of \$116,169. The following graph is illustrative:



101. In short, the SPJP has enjoyed a salary increase of over 70% in 10 years. CPI in Whitehorse since that time (to the end of 2006) has been only 15.4%, meaning that there has been a real increase of income of over 50% over this period. It might be noted that the increases for Territorial Court Judges over the same period were considerably less, at 47.8% before inflation, or 35% after. Of course, it also must be noted that there are currently substantial

employment benefits associated with this salary: a defined benefit pension plan, health benefits, Yukon bonus, paid education leave, etc.

102. Accordingly, there is clearly no need for a “catch up” or out of line adjustment to bring the salary of this position in line with others, as this was done many years ago.

103. Second, the Government’s proposal recognizes the increased experience of the SPJP over the last three years, which is of value to the Government. The increases it proposes, therefore, are anticipated to exceed inflation and therefore be real increases in income to reflect this increased experience.

104. At Tab 14 of the Supporting Materials are the annual CPI statistics for Whitehorse since 1986. Those statistics demonstrate that between 1986 and 2010, the average annual CPI increase has been 1.82% over that period. More recently, in the last 10 years, the average annual CPI increase has been only 1.54%. As such, the Government’s proposal will almost certainly exceed CPI, if history is any indication.

105. For all of the above reasons, and in consideration of the factors specifically itemized in the Act and discussed above, the Government respectfully submits that its proposal of 2% increases for each of 2010, 2011 and 2012 is a reasonable and appropriate proposal.

## **2. RESPONSE TO THE SPJP’S ANTICIPATED SALARY PROPOSAL**

106. At the outset, it must be noted that the parties are making their submissions without having seen the others’. As such, this response by the YG is based solely on the limited information which SPJP Cameron provided to the Deputy Minister. The YG reserves the right to file further submissions on receipt of SPJP Cameron’s submissions, if necessary, as his full submission has not yet been seen, and the Government’s response is somewhat anticipatory.

107. It is anticipated that SPJP Cameron will propose that his salary be set as a fixed percentage (say 65% - 85%) of a Territorial Court Judge’s salary, on the theory that the closest comparator of his duties – and therefore his income – are those of a Territorial Court Judge’s.

108. With respect, the Government believes that the use of a percentage formula is inappropriate in this case, for three reasons:

- A. Use of a set percentage defeats the purpose of the legislation;
- B. Use of the set percentage proposed would lead to an inordinately large wage increase, and violate the legislation; and
- C. These identical requests have been made by other JPs before Commissions in other jurisdictions, and been universally dismissed as inappropriate. Further, such determinations have been upheld by the courts.

109. Each of these reasons will be discussed in turn.

**A. INAPPROPRIATE TO USE SET PERCENTAGE**

110. First, it is submitted that as a general rule, it is simply not appropriate to set judicial salaries by way of a formula. Such an approach fails to take account of objective criteria as is required by the *PEI Reference* case. Moreover, if formulas are to be used to establish judicial remuneration, one must ask what this does to the role of the Commission and the requirements to make independent recommendations having regard to the numerous factors set out in the TCA.

111. It has been found that the idea of using a straight percentage of another's salary is legally problematic. In the *Provincial Court Judges Association of New Brunswick* case, *supra*, the New Brunswick Court of Appeal made these comments about the propriety of setting Provincial Court Judge's salaries as a fixed percentage of Superior Court Judges salaries:

I recognize that the 2001 Commission did not fix the salary of New Brunswick's Provincial Court judges as a percentage of the federal salary. *Had it done so, then arguably future provincial commissions would have no role in fixing judicial salaries. Attention would inevitably focus on the salary recommendation of federal commissions, to the exclusion of the framework set out in the Provincial Court Act.* [emphasis added; at paragraph 156]

112. And further:

One other point must be addressed. Elsewhere, it has been held that a salary recommendation based on a percentage or ratio of the salary level of another court differs

from a recommendation embracing full parity. The latter type of recommendation is said to depend on notions of equality, while the former does not: see *Bodner v. Alberta* at paragraph 46. With respect, I cannot accept the distinction. ***The reality is that a salary recommendation based on full or partial parity with judges of another court means that other comparator groups are being ignored.*** Partial parity is based on the concept of equality with differences; differences that are reflected in the degree of parity recommended. The problem, of course, is that the remuneration commission is faced with the most difficult task of justifying the amount of the salary differential. Unless the commission gives compelling reasons for its recommendation, the government will simply reject it on the basis that it is purely arbitrary. [emphasis added; at paragraph 164]

113. In the 2004 Yukon JCC, Judge Stuart (a former Territorial Court Judge) made a submission before the Commission that a set formula should be used to set judicial salaries. The Commission doubted that it had the jurisdiction to make such a recommendation, even if it were inclined to do so:

8.2.5 Judge Barry Stuart, retired, proposed that the Commission establish a formula for future salary changes, in order to simplify the process. In the view of the Commission, this probably exceeds our mandate. We would also add that it is inevitable that any formula would be subject to review as circumstances change. We have, however, addressed in this report other ways to simplify the process.

114. In the 2007 Yukon JCC, the Commission again rejected the notion of using a fixed percentage as a formula for calculating the SPJP's salary.

115. In summary, utilization of a set percentage fetters the jurisdiction of a JCC to set remuneration of a SPJP depending upon changing factors.

116. It might be argued that a percentage-based formula is necessary to recognize the "judicial" nature of SPJP Cameron's position. However, the nature of this position has already been acknowledged by past JCC's, and further recognition through a revamped compensation scheme is unnecessary.

117. Accordingly, a set percentage is neither an appropriate manner in which to set the salary of the SPJP, nor is it necessary for recognizing his duties.

**B. INORDINATE INCREASE**

118. The second reason why the SPJP's proposal is not appropriate is simply due to the size of the wage increase being sought through the percentages, and the fact that this will cause his salary to be well off-side of what is binding on the Government as set out in the legislation.

119. As to the size of the requested wage increase, 65% to 85% of a Territorial Court Judge's current salary (\$228,880) would be a salary of between \$148,772 and \$194,548 per annum. This range would therefore amount to a minimum increase in the SPJP's salary in the first year of 28%, to a maximum of 67.4%.

120. With respect, such a substantial increase in salary is unsustainable. There is no basis to conclude that the factors set out in the Act warrant anywhere near such an increase. There is simply no evidence that the nature of the duties performed by the SPJP have evolved in anything other than the most minimal manner since the previous three Commissions, both of which set salaries which were considered fair and appropriate at the time.

121. The second concern is that any such recommendation by the Commission would not be binding on the Government. Section 17 of the Act is repeated here for convenience:

**Recommendations binding**

17(1) Subject to subsection (2), recommendations made by the commission with respect to judicial remuneration in accordance with section 14 shall bind the government.

*(2) Recommendations made by the commission with respect to judicial remuneration shall not bind the government to the extent that these exceed the highest total value of judicial remuneration provided to territorial or provincial judges of British Columbia, Alberta, Saskatchewan, or the Northwest Territories.*

*(3) If the recommendation of the commission exceeds the highest total value of judicial remuneration set out in subsection (2), the Commissioner in Executive Council may substitute the highest total value of judicial remuneration for the commission's recommendation. [emphasis added]*

122. It will be recalled that the salaries of the JPs in the comparator jurisdictions are as follows:

**Salaries of JPs in Yukon and Comparator Jurisdictions**

	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>
Alberta	\$80,000	\$85,000	\$85,000	\$100,000	\$105,000	\$110,000	\$110,000	\$110,000	\$110,000	\$110,000	\$110,000
BC	\$70,312	\$72,070	\$73,872	\$73,872	\$73,872	\$73,872	\$77,112	\$78,654	\$94,730	\$97,100	\$99,525
Sask	\$69,588	\$71,676	\$73,464	\$73,464	\$80,264	\$81,020	\$83,156	\$87,992	\$91,316	\$95,204	\$96,560
Yukon	\$66,779	\$85,000	\$85,000	\$87,000	\$98,500	\$101,356	\$103,687	\$109,500	\$112,785	\$116,169	TBD

123. Clearly, any salary increase along the lines requested by SPJP Cameron (i.e. between \$148,000 and \$195,000 per year) would obviously contravene the limits imposed under the Act that make the JCC's recommendations binding. While the Commission could theoretically grant the request and have the highest total value substituted by the Government, it is respectfully submitted that the Commission should not make (nor be asked to make) recommendations which are not binding upon the Government.

124. In fact, even if the Government's proposal is accepted, SPJP Cameron is earning more than any of the JPs in the comparator jurisdictions. While the Government's proposal will therefore exceed the total value of the salaries as we know them today, the Government is cognizant of the fact that Alberta JPs will likely be receiving an increase for salaries post-March 31, 2008 following their current JCC.

**C. SPJP'S REQUEST CONTRARY TO PRECEDENT**

125. The SPJP's request to have his salary set as a fixed percentage of a Territorial Court Judge is not a new request, either for him, or for JP's in other Canadian jurisdictions. In fact, on every single occasion where the request has been made, it has been denied – with one exception, being in Alberta. However, as will be discussed below, the Alberta Government refused to accept that recommendation, a decision ultimately upheld by the Supreme Court of Canada.

i) *Previous Requests Made in the Yukon*

126. If SPJP Cameron is seeking a salary based on a fixed percentage, this Commission is the fourth time the SPJP has made such a request. None of the previous Yukon JCC's acceded to his request. With respect, there is no reason why this Commission should come to a different conclusion.

127. In the submission made by the SPJP to the 2001 JCC, it was suggested on his behalf by counsel that salary of the SPJP be approximately two-thirds of the salary of Territorial Court Judges. This approach was not adopted by that Commission.

128. The 2001 Commission was the first independent Commission to consider the remuneration of the SPJP, and it was fully aware of the type of work and workload of the SPJP. It recommended a substantial base increase to the salary. It also recommended increased benefits and that the SPJP participate in the beneficial judicial pension plan on the same basis as the Judges. All of this was to bring the SPJP's remuneration package up to the appropriate level to reflect the role of the SPJP as judicial officer, and to properly compensate him for work done. It was clear that all of this was done as an alternative to utilizing a fixed percentage.

129. In 2004, the SPJP once again made a request before the 2004 JCC for a salary based on a fixed percentage, in these terms:

He proposed that his salary be expressed as a percentage of the salary of a judge of Yukon Territorial Court both as a way to symbolize his status as a senior judicial officer and to simplify future salary review. [at page 9]

130. Once again, the JCC did not grant this request, noting as follows:

6.3.3 A position required to be filled by a lawyer, or other highly trained professionals in our society who can command high salaries, inevitably must have a salary commensurate with lawyers in other jobs to attract new people, and, fairly or not, a position that lacks that training condition need not be so commensurate.

6.3.4 A Yukon Territorial Court judge may often do the same or very similar work as a justice of the peace, but on the other hand a Territorial Court judge can and is

asked to take on greater responsibilities than those ordinarily allotted to any justice of the peace. [at page 10]

131. In the 2007 Yukon JCC, the Commission again rejected the notion of using a fixed percentage as a formula for calculating the SPJP's salary.

132. In short, three previous Yukon JCC's have found that fixing the SPJP's salary as a percentage of a Territorial Court Judges salary is not appropriate, and there should be a point where this principle does not need to keep being repeated.

*ii) Similar Requests Made in Other Jurisdictions*

133. Other JP JCCs across Canada have been presented with similar requests, and with one exception (discussed below) have universally agreed that such a request is not an appropriate one as a basis for setting a JP's salary. All JP JCCs have recognized that merely because a JP does work similar to a Provincial Court Judge does not mean a straight line must exist between the two salaries, or that Provincial Court Judges are the only proper comparator group.

134. The 2000 Ontario Justices of the Peace Remuneration Commission refused to accede to the request of the Association of the Justices of the Peace of Ontario that the salary of a Justice of the Peace be set at 70% of that paid to a Justice of the Ontario Court of Justice.<sup>15</sup> The Commission held as follows:

We can find no justification for such an award. A Judge of the Ontario Court of Justice is a lawyer who has practiced law for at least 10 years and has shown that he or she has obtained a pre-eminent position in the legal profession. As counsel for the Ontario Attorney General pointed out, the salary of a Judge of the Ontario Court of Justice is heavily impacted by the need to attract senior counsel without requiring undue financial sacrifice. This has no application to Justices of the Peace. [at page 8]

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<sup>15</sup> See Tab 17 of the Supporting Materials

135. In the first Judicial Compensation Commission for JPs in BC in 2002,<sup>16</sup> chaired by the well-known jurist Ted Hughes, a request was made by the JP Association for their salaries to be set as a fixed percentage of BC's Provincial Court Judges. The Commission unanimously declined to make such a recommendation, in these terms:

The most obvious comparison is with BC's Provincial Court Judges. JJPs do "judge work," they sit on the bench, wear gowns, make decisions and perform tasks that would otherwise be done by judges. However, the committee is also mindful of the differences in their role and in the qualifications required for the job. The committee would not recommend expressing the JJPs remuneration as a percentage of a judge's salary if for no other reason than that the jurisdiction of either of them can change at any time and thus the nature of their respective duties and functions. [at page xxii]

136. And further:

The relationship between the roles of the Provincial Court Judge and Judicial Justice of the Peace leads the committee to the view that it is unreasonable to pay a JJP a salary that is 45 or 46% of that paid to a judge. [at page xxi]

137. The issue came up again in BC at the 2004 Commission, where the JP Association's request, and the Government's response, were as follows:

The JJP Association asks this Commission to recommend a rate that equals at least 65% of a Judge's salary, which currently is \$161,250.

The government's position is that JJPs are being paid a fair and reasonable salary, and one that is commensurate with their more limited job functions. The government points out that a salary of 65% of the current Judges' salary would amount of \$104,812 and would represent an immediate increase of 41.9%. This, the government submits, is not reasonable or justified. [at pages 10-11]

138. The Commission responded to this request as follows:

In approaching this matter, the Commission first notes that it does not accept the position of the JJP Association that JJP salaries should be set at 65% of a Judge's salary. While the roles and responsibilities of JJPs overlap with those of Judges to some extent, overall their jurisdiction and authority is significantly narrower than that of Judges. Also, they operate in proceedings that are, for the most part, less legalistic and formal than those

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<sup>16</sup> Judicial Justice Compensation Committee: 2002 Report to the Attorney General [Tab 18 of the Supporting Materials]

over which Judges preside. The focus of their court work is on matters that do not attract sentences of imprisonment and the fines generally imposed by JJPs are relatively low.

Additionally, the JJPs are not required to be legally trained and have no authority to make decisions on complex constitutional questions or to punish individuals for contempt of their processes. For the most part, decisions are fact-based and are rendered orally; written reasons are very much the exception rather than the norm. This is consistent with their limited jurisdiction and the nature and type of high-volume work in which they are engaged.

*For these reasons, the Commission does not accept that the position of Judge is the best comparator for purposes of determining reasonable salary levels for JJPs, and is unwilling to recommend that JJP salaries be pegged to a percentage of Judges' salaries.* [at pages 27-28; emphasis added]

139. Most recently, the 2010 BC Judicial Justices of the Peace Compensation Commission rejected the notion that JP's salaries should in any way be tied to the salary of a Provincial Court Judge, in these terms:

*We do not accept that there should be a fixed or tied relationship between JJ compensation and PCJ compensation levels.* However, like the 2007 JJPCC, we accept that the disparity in those levels should not be unfairly widened to the prejudice of the JJs. [emphasis added; at p. 37]

140. The only occasion in which a JP's salary was tied as a percentage of a Judge's salary was at the somewhat ill-fated 2000 JP Compensation Commission in Alberta. There, in its report dated February 29, 2000,<sup>17</sup> the Commission recommended that a JP's salary be fixed at two-thirds of an Alberta Provincial Court Judge's salary (see page 29 of the report).

141. The Government of Alberta refused to accept this recommendation (amongst others of the Commission). A Court application to set aside the Government's decision was brought by the Judges, and was successful before the Alberta Court of Queen's Bench. The Government unsuccessfully appealed this to the Alberta Court of Appeal. It took a final appeal to the Supreme Court of Canada.

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<sup>17</sup> The Justices of the Peace Compensation Report [Tab 19 of Supporting Materials]

142. In a lengthy decision<sup>18</sup> dealing with 4 separate JCCs across Canada, the Supreme Court of Canada allowed the Alberta Government's appeal, and upheld the Government's decision to not accept the Commission's recommendations (amongst other) that a JP's salary be set as a fixed percentage of a Provincial Court Judge's salary. The Government's reason for rejecting the Commission's comparison of JP's salaries to Provincial Court Judges' salaries was found by the Supreme Court to satisfy the "rationality" test. Accordingly, the Government's decision to substitute substantially reduced salaries for JPs from those recommended by the Commission was upheld.

143. Even apart from the Alberta Commission's troubled legal saga, it bears noting that the situation of JPs in Alberta is in any event quite different from that in the Yukon. Justices of the Peace in Alberta are required to be lawyers, and are required to have a minimum of 5 years of legal experience. In fact, as pointed out at page 11 of the Alberta Commission's report, at that time the sitting Justices of the Peace had a range of experience in terms of years at the bar from 10 to 38 years, with the average being 19.87 years. The presiding Justices of the Peace had a range of experience in terms of years at the bar from 5 to 42 years, with the average being 15 years.

144. In summary, this jurisdiction and several others have found that tying a JP's salary to a Judge's salary is not warranted, and this determination has been upheld by the Supreme Court.

#### **4. RESPONSE TO THE SPJP'S PENSION PROPOSAL**

145. The Government understands that the SPJP is requesting the start date for his pension be changed from April 1, 1996 (where it was set in 2001), to July 1, 1994.

146. The Government does not agree that this retroactive change should be made. First, there are likely to be significant downstream costs to the Government to make such a retroactive

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<sup>18</sup> *Provincial Court Judges Association of New Brunswick v. New Brunswick (Minister of Justice) et al* [2005] S.C.J. No. 47 [Tab 10 of Supporting Materials]

change. Secondly, this issue has been dealt with by no less than three previous Yukon JCC's, and again, it is long past time to put this issue to rest.

147. First, the request to buy back pensionable service may appear at first blush to only require payment by the employee. This would be incorrect. Because this is Defined Benefit plan, as opposed to a money contribution plan, the effect of the employee "purchasing" additional service is of course to require the Government to guarantee a larger pension at the employee's retirement – for the size of the pension is naturally dependent upon years of service and the salary at retirement.

148. Following receipt of AON's June 2011 report, the Government requested AON to provide more specificity as to exactly what costs would be involved in a pension buy-back. AON's opinion is contained in its supplementary report dated August 22, 2011 [Tab 21 of Supporting Materials]. According to this report, the cost to SPJP Cameron to purchase back this service would be \$134,400.<sup>19</sup> However, this is not the total cost. First, because the funds would be outside of the registered portion of the plan, the investment returns (assumed at 6%) will not be tax-sheltered – leaving the Government on the hook to make up the difference. Second, the actuary's calculation of the total cost is necessarily based on the actuarial assumptions set out in the opinion. While actuaries are paid to be conservative in their assumptions, they are not guarantors of a result. As such, should any of the actuary's future prognostications not come to pass (e.g. interest rate, inflation rate, etc.), it is the Yukon Government and taxpayers who will be left to foot the bill – for of course the Government must guarantee the pension, fully-funded or not. These potential eventualities are all set out in AON's report.

149. In short, while "buying back" pension time would obviously be a cost to the SPJP, it is certainly not cost neutral for taxpayers. It should not be forgotten that the initial cost out of the public funds to buy back the past service for the SPJP, as recommended by the 2001 Commission to the start date selected of April 1, 1996, was \$310,000, with an ongoing future service cost of \$58,750 per year.

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<sup>19</sup> The cost has increased significantly from AON's June 2011 estimate (of a minimum of \$94,000), as AON's current opinion has the benefit of a recent Plan evaluation as of March 31, 2011.

150. Moreover, it cannot be argued that these extra costs are justified because the existing pension of the SPJP is somehow deficient. As outlined above, JPs in Alberta do not even have a funded pension; they instead receive an extra 10% of their salary in lieu. In other words, Alberta JPs must fund their own pensions – and thus they bear the risk, not the Government. In BC and Saskatchewan, JP's are part of the public service pension plans, which plans are considerably more modest than judicial pension plans, like the one to which SPJP Cameron belongs.

151. The Government's second reason for opposing this request is because this Commission is again the fourth time such a request has been made. In the Government's respectful submission, one JCC should not sit in review of another: once a Commission has determined what it considers to be fair and reasonable compensation and benefits, another Commission should not come to a different conclusion respecting the exact same issue. Otherwise, compensation for any three year period will never be final – for a party could always come back and ask that the compensation for that block of time be changed. The Government accepts the following statement from the 2004 Commission on this exact point:

- 3.2 Notwithstanding the directions about mediation, and the joint submissions received, the Commission is of the view that it is the scheme of the *Act* that the Commission itself must decide what is fair and reasonable compensation.
- 3.3 *Notwithstanding contrary submissions, the Commission, in its opinion as a result of the principle just stated, must proceed on the basis that the Commission has no authority to consider itself as having any kind of appeal or review role regarding the work of earlier commissions.* [at pages 4-5; emphasis added]

152. The 2004 Commission was somewhat prescient on this point, for this principle was subsequently affirmed by the Supreme Court of Canada.

153. In the *Provincial Court Judges Association of New Brunswick* case, *supra*, the Provincial Court Judges of New Brunswick sought parity with Superior Court Judges at the 1998 JCC. This proposal was rejected. At the 2001 Commission, the Judges brought the same argument forward, and it was again dismissed. When the Government refused to accept the 2001 Commission's

salary recommendations, the Judges brought judicial review proceedings. At the New Brunswick Court of Appeal, the Court set out the principle that previous JCC's should be presumed by later commissions to have made appropriate compensation recommendations:

74 In summary, there is a rebuttable presumption that the salary recommendation made by a previous commission represented appropriate compensation. *But unless the appropriateness of the previous commission's recommendation is challenged, the presumption remains in place. Thus, the Association was entitled to raise its parity argument before the 2001 Commission, an issue that the 1998 Commission did not address for reasons outlined earlier. This is not to suggest that the Association can persist with the argument before future commissions.* To the contrary, in the reasons that follow it becomes clear that the Association's parity argument is fatally flawed. [emphasis added]

154. When the case went to the Supreme Court of Canada in 2005,<sup>20</sup> the Supreme Court affirmed that principle in these words:

¶ 14 The *Reference* laid the groundwork to ensure that provincial court judges are independent from governments by precluding salary negotiations between them and avoiding any arbitrary interference with judges' remuneration. The commission process is an "institutional sieve" (*Reference*, at paras. 170, 185 and 189) - a structural separation between the government and the judiciary. The process is neither adjudicative interest arbitration nor judicial decision making. Its focus is on identifying the appropriate level of remuneration for the judicial office in question. All relevant issues may be addressed. *The process is flexible and its purpose is not simply to "update" the previous commission's report. However, in the absence of reasons to the contrary, the starting point should be the date of the previous commission's report.*

¶ 15 *Each commission must make its assessment in its own context. However, this rule does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors. The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider.* A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after a careful review, make its own recommendations on that basis. [emphasis added]

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<sup>20</sup> Tab 10 of Supporting Materials

155. The pension start date of April 1, 1996 was set by the 2001 Commission. It should first be noted that all parties made submissions to the 2001 Commission on the issue of pension, including the SPJP who was represented by legal counsel. The SPJP at that time argued that the period from July 1994 to September 1998 be counted as service for pension eligibility, and that he be permitted to buy back this pensionable service time.

156. The Commission was well aware that the initial start date of the term of the SPJP as part of the pilot project was July 1994.<sup>21</sup> Nevertheless, the 2001 Commission determined that the appropriate start date for the pension was April 1, 1996. It is submitted that no change in facts has been brought forward to justify overturning the recommendation of the 2001 Commission, nor can it be suggested that the 2001 Commission misconceived the facts on this point, or made some other error which must now be corrected.

157. The exact same issue was raised a second time, before the 2004 Commission,<sup>22</sup> in these terms:

He proposed a change in his pension start date to July 1994 with corresponding buy back provisions. [at p. 9]

158. The 2004 Commission rejected this request, as follows:

6.4.8 The Commission notes that pension matters were addressed by the previous commission and declines to make any adjustments to the present pension start date. [at p. 11]

159. This issue made a third appearance at the 2007 JCC, where the Commission, like its two predecessors, rejected the request:

The Commission reiterates the position expressed by the 2004 Commission, that it “must proceed on the basis that the Commission has no authority to consider itself as having any kind of appeal or review role regarding the work of earlier Commissions.” If there was an obvious mistake or error made or argument missed a subsequent Commission could potentially examine the error. The 2001 Commission considered that the Senior

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<sup>21</sup> See page 9 of the 2001 Commission’s report at Tab 5 of the Supporting Materials.

<sup>22</sup> Tab 6 of Supporting Materials

Presiding Justice of the Peace was not included in the 1998 Commission and recognized his important role in the justice system in Yukon in making its recommendations.

This Commission is not of the opinion that an error was made in setting the pension start date as the date that full-time, permanent employment commenced and makes the following recommendation:

*The Commission recommends that no change be made to the pension start date of April 1, 1996. The Commission further recommends that the "window period" as recommended in A4. be applicable to the Senior Presiding Justice of the Peace.*  
[emphasis in original]

150. In summary, the 2001 Commission, being the first Commission to deal with the SPJP's salary and pension package, was the time and place for the start date of the pension to be decided. The issue was fully argued by competent counsel, the Commission was aware of the issue, and a considered (and unanimous) decision was made. With respect, the issue of the pension start date has been fully and finally decided, and there are no circumstances that would warrant a reconsideration of this matter.

151. Accordingly, the Government respectfully requests that no change to the pension start date be made.

**SECTION VI: CONCLUSION**

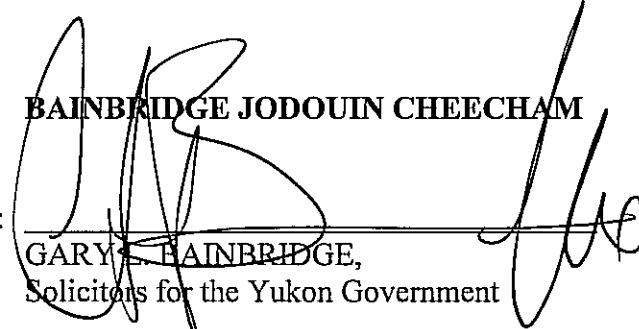
152. The Government submits that its proposed solutions to the unresolved remuneration issues for the SPJP as set out above be adopted as the recommendations of the Commission. The proposal by the Government ensures that the SPJP's salary is well above the adequate minimal level required for judicial office. At the same time, the increases proposed can be justified on an objective basis and bear an appropriate relationship to compensation in the comparator jurisdictions given the cost of living and economic growth rates in the Yukon compared to those jurisdictions. Accordingly, with this proposal, the public confidence in the independence of the SPJP would be maintained.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 29<sup>th</sup> day of August, 2011.

**BAINBRIDGE JODOUIN CHEECHAM**

Per:

  
GARY BAINBRIDGE,  
Solicitors for the Yukon Government

**APPENDIX A****SUMMARY OF RECOMMENDATIONS OF 2001 AND 2004 JUDICIAL  
COMPENSATION COMMISSIONS RELATING TO THE SPJP****2001 Commission****a) Salary**

- the salary for the SPJP, which at the time of the Commission's report was \$66,779, was increased to
  - \$85,000 as of September 2001
  - \$87,000 as of April 1, 2003

**b) Pension**

- previously, there was no pension plan applicable to the SPJP – the SPJP now receives a pension on the same basis as the Judges with pensionable service deemed to have commenced on April 1, 1996
- the terms of the plan are:
  - SPJP's contributions were 7% per annum
  - Annual accrual rate of 3%
  - Pension to be based on average salary of the highest 2 years

**c) Vacation**

- annual vacation entitlement for the SPJP was increased to 35 days per annum, to be the same as that provided to the Territorial Court Judges

**d) Other Benefits**

- The S.P.J.P. did not previously receive any benefits - the SPJP now receives all the same benefits as the Judges with the exception of educational leave

## **2004 Commission**

### **a) Salary**

- The salary for the SPJP, which at the time of the Commission was \$87,000, was increased to \$98,500 effective April 1, 2004, with cost of living (CPI) increases to take effect on April 1, 2005 and April 1, 2006.
- The SPJP was granted the same incidental expense allowance as judges, namely, up to \$3,000 per annum for professional expenditures.

### **b) Benefits**

- The SPJP was granted the same Yukon Senior Management Benefits applicable to Judges and Senior government officials, which includes the Yukon bonus, travel bonus, and various leaves.

### **c) Education Leave**

- The SPJP was granted educational leave, on a paid basis, of up to one month per year, with accommodation and travel expenses also paid by the Government.

## **2007 Commission**

### **a) Salary**

- The salary for the SPJP, which at the time of the Commission was \$103,687, was increased 5.606% to \$109,500 effective April 1, 2007, increased 3% to \$112,785 effective April 1, 2008, and increased a further 3% to \$116,169 effective April 1, 2009

### **b) Benefits**

- The SPJP was to continue to receive the same terms, benefits, allowances, stipends etc. that were currently in effect